



CANADIAN HUMAN RIGHTS TRIBUNAL

# Annual Report 2013



**Providing effective resolution of discrimination complaints for Canadians**

[WWW.CHRT-TCDP.GC.CA](http://WWW.CHRT-TCDP.GC.CA)

Canada



© Minister of Public Works and Government Services

Canadian Human Rights Tribunal, Annual Report 2013  
Tribunal canadien des droits de la personne, Rapport annuel 2013

ISBN: 1494-524X

Cat. no.: HR61-2013E-PDF

## TABLE OF CONTENTS

Chairperson's Message .....	2
What We Do .....	4
Human Rights Complaint Resolution Framework .....	5
Resolving Complaints Fairly and Effectively through Mediation .....	6
How the Tribunal Works .....	8
Caseload .....	9
Tribunal Rules and Procedures .....	11
Jurisprudence .....	12
Tribunal Activities .....	17
Members of the Tribunal .....	18
For Further Information .....	22

## CHAIRPERSON'S MESSAGE

I am pleased to present the Canadian Human Rights Tribunal's 2013 Annual Report. Discrimination cases can be some of the most challenging and complex in the sphere of Canadian law; for this reason, the Tribunal remains ever vigilant in delivering its mandate of applying the principles of the *Canadian Human Rights Act* to complaints that are referred to it by the Canadian Human Rights Commission. In doing so, we strive to ensure that all Canadians have access to speedy, fair and transparent mediations and hearings and provide just, concise and well-reasoned rulings and decisions for proceedings that fall under our mandate.

During my second year as Acting Chairperson of the Tribunal, I witnessed some considerable successes emerge while managing ongoing challenges and a record caseload. The Canadian Human Rights Commission referred 96 new complaints to the Tribunal in 2013 compared to 128 in 2012. As the Tribunal carried forward 372 active complaints from earlier years, its caseload for the year was a record 468 cases, of which 369 complaints remained active at the end of the year.

Although the Tribunal received fewer complaints than in 2012, our overall caseload continues to be high involving as it does the adjudication of increasingly complex cases, where the most frequently invoked grounds were disability, age and gender. We also continued to receive cases stemming from the repeal of section 67 of the *Canadian Human Rights Act*. This repeal was accompanied by new interpretive provisions that apply to cases involving First Nations governments; provisions that will challenge us in the coming years to examine an area of Canadian human rights law never before encountered by this Tribunal. Additionally, the upward trend towards parties choosing to self-represent is also affecting our workload. Given our obligation to assist all parties in understanding and meeting the procedural requirements of a quasi-judicial inquiry, the Tribunal accommodates self-represented complainants and respondents, which often entails allowing them more time to file their supporting documents and prepare for hearings. This can result in unforeseen and ongoing delays.

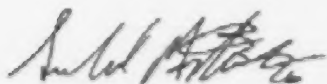
Given its micro size and limited resources, the Tribunal continually strives to find new and innovative ways of improving and streamlining its processes while ensuring it resolves complaints in an efficient and effective manner within the boundaries of natural justice, procedural fairness and the rules of law. In that context, I am pleased to report that in 2013 the Tribunal held a record number of mediations across Canada, almost doubling the number from last year. Mediation continues to be a Tribunal success story, as we work with all parties to facilitate the settling of disputes in a more informal, relaxed fashion, without the stresses and procedural constraints of the hearing room and adversarial process. Not only do mediated settlements provide resolution for the parties immediately, they are much more cost-effective and save both the parties and the taxpayer money. The trend towards mediation is continuing to rise and the Tribunal expects to achieve increased efficiencies through this cost-effective, collaborative approach.

In terms of external activities, the Tribunal was invited to appear before the Senate Committee on Human Rights as part of its continuing examination of Bill C-279, which would add gender identity to the list of prohibited grounds of discrimination in the *Canadian Human Rights Act*. As Acting Chairperson, I provided the Committee with an overview of the Tribunal's mandate and informed the Committee of cases involving gender identity or gender expression that we have dealt with in the past.

In September, the Tribunal hosted a delegation of prominent experts and scholars from Taiwan who wished to learn from our experience in resolving human rights complaints and hear our perspective as a federal quasi-judicial body. The meeting provided insight to the group as they pursue creating a national human rights institution in Taiwan.

In closing, it has been an exciting, challenging and rewarding year for the Tribunal. Without the hard work, dedication and professionalism of the Tribunal Members, management and staff, the Tribunal would not have been able to execute its mission as capably as it did, and Canadians have tangibly benefitted from its efforts. In particular, I am deeply indebted to our Members for rendering rulings and decisions as fairly and expeditiously as possible, given the pressures that come with unpredictable workloads, vulnerable parties and increasingly complex cases. As we move forward, the Tribunal will continue to manage these workloads as efficiently as possible while continuing to search for new ways of streamlining our financial and administrative processes to maximize our effectiveness and efficiency in these resource-challenged times.

I will also continue to closely monitor our performance metrics and manage our exposure to risk while remaining committed to optimizing resources. More importantly, I remain optimistic that although the coming year will undoubtedly bring new developments, we will continue to deliver just and timely resolutions to human rights cases, for the benefit of the parties, and for all Canadians.



*Susheel Gupta,*  
Acting Chairperson

## WHAT WE DO

The Canadian Human Rights Tribunal is a quasi-judicial body that inquires into complaints of discrimination referred to it by the Canadian Human Rights Commission and decides whether the action cited in the complaint is a discriminatory practice within the meaning of the *Canadian Human Rights Act*. The Tribunal can also review directions and assessments made under the *Employment Equity Act*.

The Tribunal operates pursuant to the *Canadian Human Rights Act*, which aims to give effect to the principle that all individuals should have an equal opportunity to live their lives unhindered by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex (including pregnancy), marital status, family status, sexual orientation, disability (including drug dependency) or pardoned criminal conviction. The discriminatory practices outlined in the Act are designed to protect individuals from discrimination, in particular, in the provision of goods and services, employment and communications. The Act applies to federally regulated employers and service providers, including: federal government departments and agencies, federal Crown corporations, chartered banks, airlines, shipping and inter-provincial trucking companies, and telecommunications and broadcasting organizations. With the repeal of section 67 of the Act, the Tribunal now also considers complaints against the federal government, First Nations governments and federally regulated Aboriginal organizations regarding acts or decisions made under the *Indian Act*.

Like a court, the Tribunal is strictly impartial. It renders decisions that are subject to review by the Federal Court at the request of any of the parties. However, unlike a court, the Tribunal provides an informal setting where parties can present their case without adhering to strict rules of evidence and procedure. If the parties are willing, the Tribunal also offers mediation services to allow parties the opportunity to settle their dispute with the assistance of a Tribunal Member.

Administrative support for the Members rests with the Registry, which plans and arranges hearings and acts as a liaison between the parties and Tribunal Members. The Registry answers to the Tribunal's Executive Director & Registrar, who is responsible for managing the operating resources allocated to the Tribunal by Parliament. Details of CHRT activities, including recent developments in comptrollership, management accountability and public administration, can be found in the Tribunal's performance reports.

### TRIBUNAL PERFORMANCE REPORTS

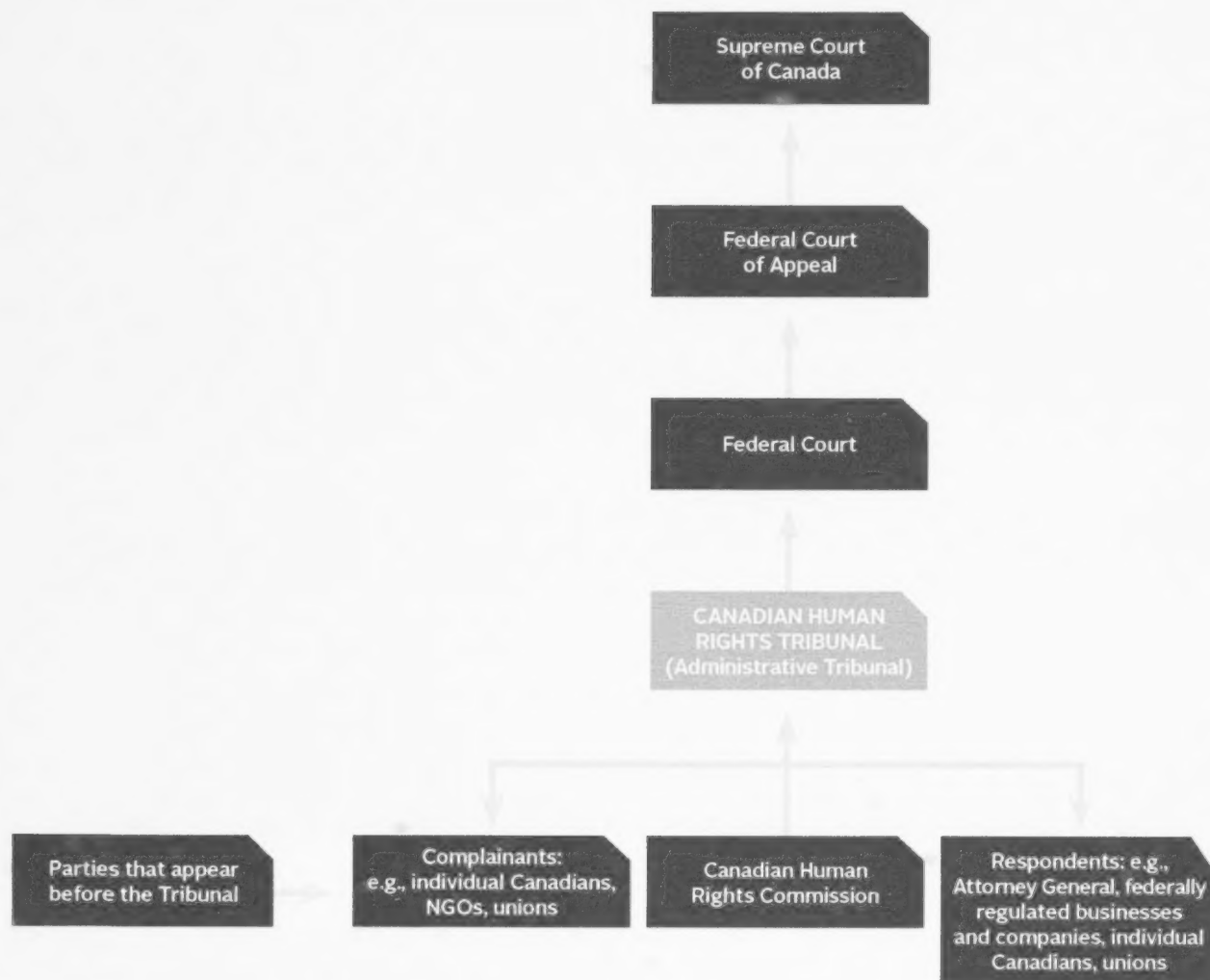
<http://chrt-tcdp.gc.ca/NS/reports-rapports/perf-rend-eng.asp>

### TRIBUNAL REPORTS ON PLANS AND PRIORITIES

<http://chrt-tcdp.gc.ca/NS/reports-rapports/plans-eng.asp>



# HUMAN RIGHTS COMPLAINT RESOLUTION FRAMEWORK (WHERE THE TRIBUNAL FITS IN)



## RESOLVING COMPLAINTS FAIRLY AND EFFECTIVELY THROUGH MEDIATION



A cornerstone of the Tribunal's complaint resolution process is its voluntary mediation program, which enables the parties to be heard without a costly adjudication hearing, and which provides them with the expertise and support to reach closure in a confidential and respectful environment.

The mediation often starts with a pre-mediation conference call, where a Tribunal Member acting as a mediator lays out the ground rules for the mediation and answers any questions or concerns the parties may have going into mediation. Pre-mediation conference-calls are especially important in cases with self-represented parties, who may have no previous mediation experience. Such calls also help manage the emotional dynamics that may be present in the case.

Mediation is offered throughout the inquiry, but in most cases, parties who engage in mediation at the Tribunal are responding to an offer for "pre-disclosure" or "early" mediation. Regardless of when during the inquiry it occurs, however, a key aspect of the mediation process is that the Tribunal Member-mediator is not the same person who adjudicates the case, should it proceed to hearing, unless all parties are represented by lawyers, and provide clear written consent to have the Member-mediator also serve as Member-adjudicator.

*"An important advantage of mediation is that it reduces the power imbalance that may exist between parties."*

During mediation, the Tribunal Member-mediator helps the parties envisage a broad range of solutions to address their underlying interests. Rather than seeking a compromise between disparate positions, the Member seeks to integrate the interests of *both* parties to a typical complaint—employer and employee or service provider and client—with an eye to healing the rift between the parties and promoting constructive

relationships. Where the Member deems it appropriate—having regard to whether the parties would be receptive to this kind of feedback—the Member may share his or her impressions about the relative strengths and weaknesses of the parties' positions.

If a first round of mediation fails to resolve the complaint, the parties may be offered mediation again after they file their particulars and disclose their relevant documents. This post-disclosure mediation, again presided over by a Tribunal Member, helps the parties identify their underlying interests and articulate a range of solutions. However, because the parties are ready to commence a full hearing at this time they are generally more informed about the relative strengths and weaknesses of their positions. There is no firm deadline for seeking post-disclosure mediation; parties may in certain circumstances even be able to explore mediation during the hearing itself.

An important advantage of mediation is that it reduces the power imbalance that may exist between parties. Since even successful parties cannot recover their legal costs at adjudication, complainants and respondents have a strong incentive to keep such costs to a minimum; but many complainants—as well as some respondents—who would not be able to afford legal representation for an entire hearing are able to retain a lawyer for a one-day mediation.

If the mediation does not result in settlement, the Member may, with the consent of the parties, help the parties narrow down the issues to be litigated in the hearing, by identifying those issues that are not—or that are no longer—points of contention. This can save the parties and the Tribunal time and resources during the hearing stage.

The appropriateness of mediation for addressing human rights complaints has long been debated. One concern has been the power imbalance that is often observed between many complainants and respondents. The Tribunal has taken



numerous measures to address this issue in recent years. For example, the physical layout of the mediation facilities makes it possible for parties to negotiate without ever having to be in the same room together. The presence of a representative from the Canadian Human Rights Commission at all Tribunal mediations can also help to level the playing field where unrepresented parties are facing a well-resourced adversary, since the Commission representative, usually a dispute resolution practitioner, can provide extra support to a party who needs it. Participants are free to bring a support person of their own with them to the mediation and parties who sign settlement agreements without legal representation can avail themselves of a seven-day cooling off period. This condition enables them to obtain legal advice about the settlement and withdraw from it within seven days following signature if they no longer feel it reflects their best interests.

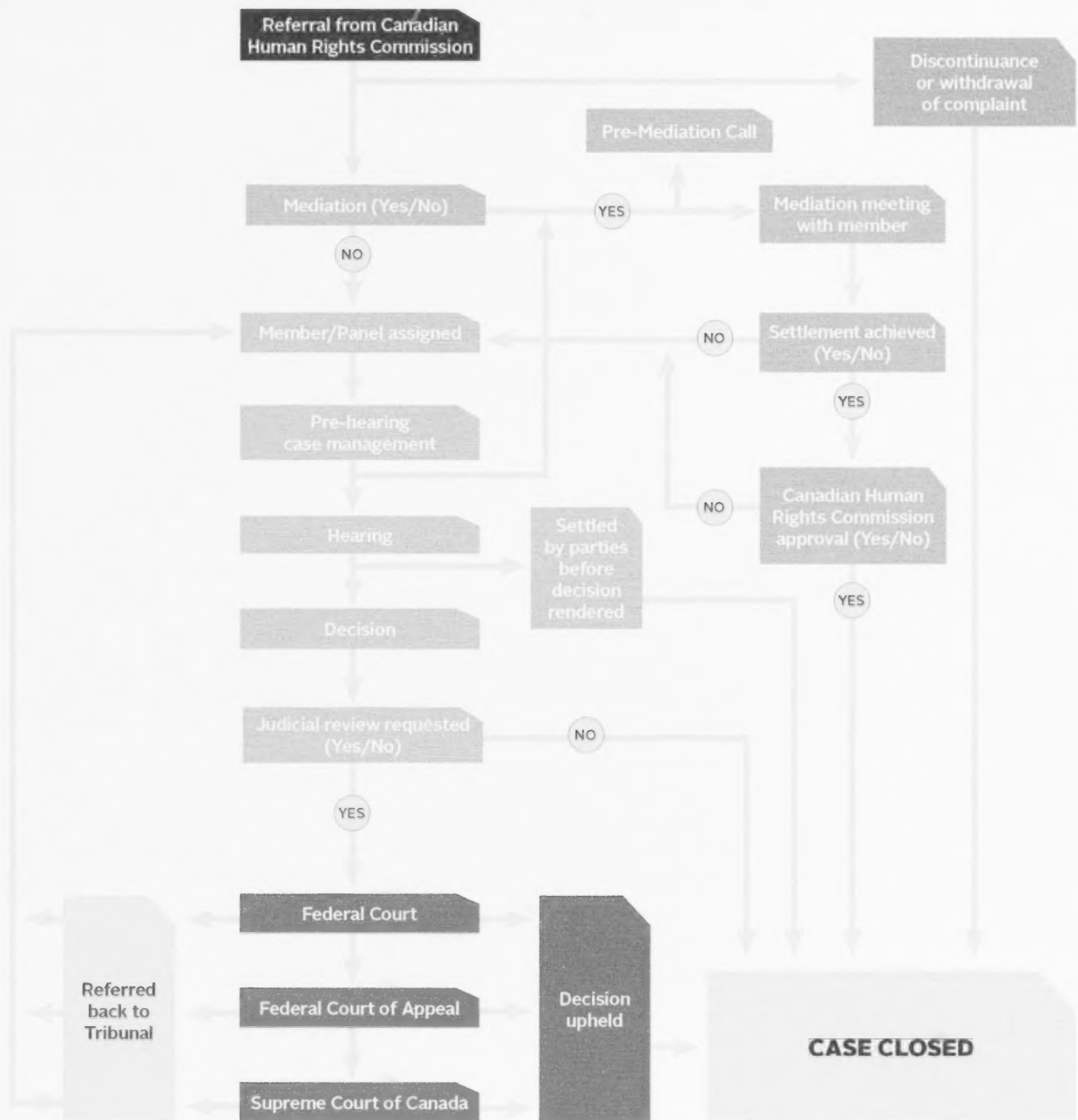
Another major concern with mediation has been whether so-called private settlements between parties are truly in the public interest, given that the complainant may settle for a remedy that fails to address a broader underlying systemic

problem. However, it is important to note that even mediated settlements are not entirely private; where they occur before the start of a Tribunal hearing, they must be referred to the Canadian Human Rights Commission for approval or rejection. Settlements approved in this way may be made an order of the Federal Court for enforcement purposes. Moreover, some mediated settlements may include clauses committing respondents to create or revise institutional policies on discrimination prevention and complaint resolution, or to adopt measurable targets and performance criteria designed to protect a wider constituency of employees or clients.

Thus mediation is a vital focus of the Tribunal's complaint resolution process, delivering speedy but principled solutions to affected parties and liberating Tribunal resources for reallocation to cases where adjudication is truly necessary.



# HOW THE TRIBUNAL WORKS



## CASELOAD

The Canadian Human Rights Tribunal is a demand-driven organization whose main function is to inquire into matters referred by the Canadian Human Rights Commission. In addition, legislative changes to the CHRA and other enabling legislation, an increase in the complexity of cases and an increase in the number of unrepresented parties contribute to the Tribunal's inability to predict its workload.

The Canadian Human Rights Commission referred 96 new complaints to the Tribunal in 2013 compared to 128 in 2012. As the Tribunal carried forward 372 active complaints from earlier years, its caseload for the year was a record 468 cases, of which 369 complaints remained active at the end of the year.

The Tribunal is currently carrying a sizable backlog of cases, but it must be noted that of those 369 active complaints, 5 complaints are waiting for decisions further to the adjournment of the hearings; 104 complaints, 101 of which are combined complaints of Air Canada Pilots, are waiting for final disposition of a judicial review at the Supreme Court of Canada; and the remaining 3 are at the Federal Court.

*"The Canadian Human Rights Commission referred 96 new complaints to the Tribunal in 2013 compared to 128 in 2012."*

The Tribunal received 2 cases further to the repeal of section 67 of the *Canadian Human Rights Act* this year. While 2013 did not bring the anticipated increase in cases directly related to the repeal of section 67, such cases are expected to be especially complex since it is expected that they will be exploring new areas of human rights law, and their scope and breadth will undoubtedly exceed that of most complaints filed with the Tribunal to date.

Although the Tribunal did not receive as many complaints this year compared to the last couple of years, the increasing complexity of many Tribunal cases as well as the number of cases with self represented parties are contributing causes of a growing backlog.

*"The logistics and procedural complexities associated with unrepresented parties who are trying to navigate a quasi-judicial process leads to increased numbers of motions and rulings as well as cancellation and rescheduling of hearing dates."*

Of the 96 complaints received this year, 38 complainants were self-represented, 3 complainants were represented by a non-lawyer, 6 complaints had self-represented respondents and 8 complaints had a respondent represented by a non-lawyer. This represents 57% of the total cases referred in 2013. These individuals or their representatives may not be familiar with the Tribunal's issue identification procedures and disclosure rules, or may not be able to comply with them in a timely fashion. The logistics and procedural complexities associated with unrepresented parties who are trying to navigate a quasi-judicial process leads to increased numbers of motions and rulings as well as cancellation and rescheduling of hearing dates; these irregularities have a significant effect on the scheduling of other cases.

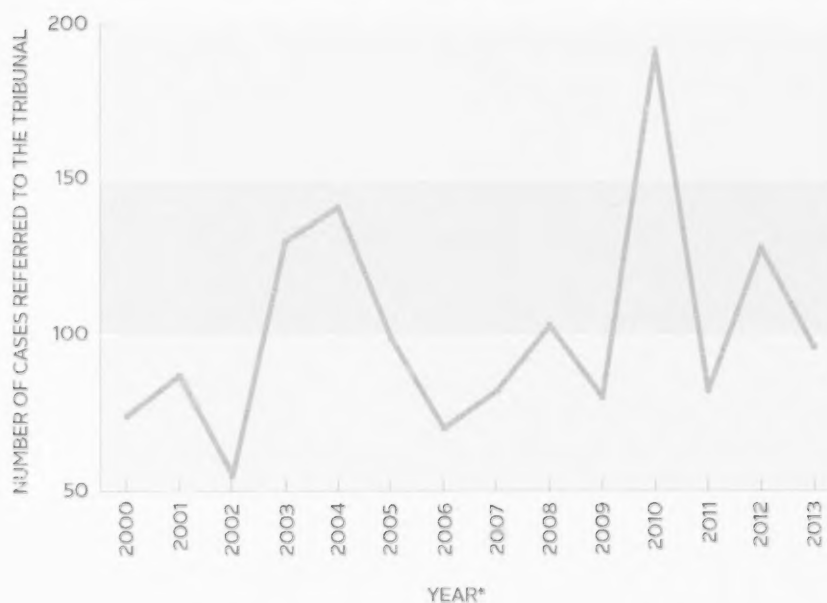
In 2013, Tribunal members conducted 72 mediation sessions, almost doubling last year's number of sessions; presided over 180 days of hearing; conducted 139 case management conference calls; and issued 5 decisions and 31 rulings.

A total of 70 complaints were resolved in 2013; 19 complaints were resolved as a result of decisions, 51 cases were resolved as a result of mediation and 29 cases were either withdrawn or settled between the parties. It is to be noted that many of the cases referred to the Tribunal continue to benefit from an increasingly refined Tribunal mediation program. Of the 72 mediation sessions held in 2013, 71% resulted in settlements, compared to 56% last year.

Of the 96 complaints referred by the Commission this year, 33 involved complaints against federal government departments and agencies; 30 involved complaints against small businesses; 20 involved complaints against banks or other larger corporations; 10 complaints were against First Nation governments; and 3 complaints were filed against individuals. The Tribunal saw an increase in the number of complaints filed against banks and other larger corporations and First Nation governments, and a decrease in the number of complaints filed against small businesses.

The prohibited grounds of discrimination cited in the 96 complaints referred by the Commission this year (keeping in mind that often a single complaint could invoke multiple grounds) were as follows: disability (45), sex (22), race (10), colour (3), national or ethnic origin (10), marital status (9), family status (8), age (24), religion (1), sexual orientation (1) and retaliation (4). Discrimination based on disability continues to be the ground most frequently invoked, followed by age and sex.

Cases referred to the Canadian Human Rights Tribunal by the Canadian Human Rights Commission, 2000-2013



\* These figures are for calendar years.

# TRIBUNAL RULES AND PROCEDURES

The Tribunal has developed the following rules, procedures and guides to assist parties in their dealings with the Tribunal:

- Canadian Human Rights Tribunal Practice Note No. 1—Timeliness of Hearings and Decisions
- Canadian Human Rights Tribunal Practice Note No. 2—Representation of Parties by Non-Lawyers
- Canadian Human Rights Tribunal Practice Note No. 3—Case Management
- Canadian Human Rights Tribunal Rules of Procedure
- Guide to the Operations of the Employment Equity Review Tribunal
- Book of Jurisprudence
- Evaluative Mediation Procedures
- Tribunal Glossary (2010)

**FURTHER DETAILS CONCERNING THE TRIBUNAL'S RULES, PROCEDURES AND GUIDES CAN BE FOUND AT:**

<http://chrt-tcdp.gc.ca/NS/about-apropos/trp-rpt-eng.asp>



# JURISPRUDENCE

The bulk of the Tribunal's work involves conducting mediations and hearings, issuing rulings, and rendering decisions. In 2013, the Tribunal heard cases on a broad range of issues. The full text of all decisions and rulings is available on the Tribunal's website.

## DECISIONS AND RULINGS

### DECISIONS

For the purpose of this report, a "decision" is defined as a set of adjudicative reasons issued by a Member or Panel of the Tribunal that actually decides the question of whether a discriminatory practice occurred in a given case.

Therefore, this would exclude reasons where:

- the only issue in contention before the Tribunal is what type of remedial order is appropriate;
- the complaint is dismissed for want of prosecution by the complainant, abuse of process, delay, irreparable breach of fairness, etc.; or
- the issue before the Tribunal is a motion for some type of procedural or evidentiary order.

Reasons issued in respect of these preceding matters are classified as rulings, which are dealt with in the *Rulings* section.

### RULINGS

As noted, all sets of adjudicative reasons issued by the Tribunal that do not qualify as decisions (i.e., they do not actually decide whether a discriminatory practice occurred) are classified as rulings. This would include reasons for an order that actually dismissed a complaint or otherwise brought the adjudicative mandate of the Tribunal to an end vis-à-vis the case in question.

The table on the opposite page outlines the rulings issued by the Tribunal in 2013.

The following table outlines the decisions rendered by the Tribunal in 2013.

DECISIONS RENDERED BY THE TRIBUNAL IN 2013			
#	DATE	PARTIES	CITATION
1	March 27	<i>Antalik et al. v. British Columbia Maritime Employers Association and International Longshore and Warehouse Union</i>	2013 CHRT 8
2	May 24	<i>Matson et al. v. Indian and Northern Affairs Canada</i>	2013 CHRT 13
3	June 6	<i>Chaudhary v. Smoother Movers</i>	2013 CHRT 15
4	September 18	<i>Hicks v. Human Resources and Skills Development Canada</i>	2013 CHRT 20
5	September 30	<i>Roger William Andrews and Roger William Andrews on behalf of Michelle Dominique Andrews v. Indian and Northern Affairs Canada</i>	2013 CHRT 21



# RULINGS ISSUED BY THE CHRT IN 2013

#	DATE	CASE NAME	CITATION
1	January 2	<i>Palm v. International Longshore and Warehouse Union, Local 500 et al.</i>	2013 CHRT 1
2	January 4	<i>Murray v. Immigration and Refugee Board</i>	2013 CHRT 2
3	January 16	<i>Grand Chief Stan Louttit in a representative capacity on behalf of the First Nations of Mushkegowuk Council and Grand Chief Stan Louttit in his personal capacity v. Attorney General of Canada</i>	2013 CHRT 3
4	February 7	<i>Karimi v. MTS Allstream Inc.</i>	2013 CHRT 4
5	February 12	<i>Eadie v. MTS Inc.</i>	2013 CHRT 5
6	March 20	<i>Rai v. Royal Canadian Mounted Police</i>	2013 CHRT 6
7	March 20	<i>Kanagasabapathy v. Air Canada</i>	2013 CHRT 7
8	April 10	<i>Tabor v. Millbrook First Nation</i>	2013 CHRT 9
9	April 10	<i>Eadie v. MTS Inc.</i>	2013 CHRT 10
10	April 24	<i>First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)</i>	2013 CHRT 11
11	May 8	<i>Emmett v. Canada Revenue Agency</i>	2013 CHRT 12
12	May 24	<i>Gover v. Canada Border Services Agency</i>	2013 CHRT 14
13	July 3	<i>First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada)</i>	2013 CHRT 16
14	July 5	<i>Beattie and Louie v. Indian and Northern Affairs Canada</i>	2013 CHRT 17
15	July 18	<i>Seeley v. Canadian National Railway</i>	2013 CHRT 18
16	July 25	<i>Palm v. International Longshore and Warehouse Union, Local 500, Richard Wilkinson and Cliff Willicome</i>	2013 CHRT 19
17	October 2	<i>Seeley v. Canadian National Railway</i>	2013 CHRT 22
18	October 2	<i>Fraser v. Royal Canadian Mounted Police</i>	2013 CHRT 23
19	October 3	<i>Blodgett v. GE-Hitachi Nuclear Energy Canada Inc.</i>	2013 CHRT 24
20	October 10	<i>Emmett v. Canada Revenue Agency</i>	2013 CHRT 25
21	October 16	<i>Pelletier et al. v. Correctional Service of Canada</i>	2013 CHRT 26
22	October 17	<i>Grand Chief Stan Louttit et al. v. AGC</i>	2013 CHRT 27
23	October 18	<i>Starblanket v. Correctional Service of Canada</i>	2013 CHRT 28
24	November 12	<i>Kanagasabapathy v. Air Canada</i>	2013 CHRT 29
25	November 13	<i>Renaud, Sutton and Morigeau v. Aboriginal Affairs and Northern Development Canada</i>	2013 CHRT 30
26	November 25	<i>Marsden v. Public Works and Government Services Canada and Courts Administration Service</i>	2013 CHRT 31
27	December 9	<i>Mississaugas of the New Credit First Nation v. Attorney General of Canada</i>	2013 CHRT 32
28	December 16	<i>Itty v. Canada Border Services Agency</i>	2013 CHRT 33
29	December 16	<i>Itty v. Canada Border Services Agency</i>	2013 CHRT 34
30	December 19	<i>Grant v. Manitoba Telecom Services Inc.</i>	2013 CHRT 35
31	December 20	<i>Rai v. Royal Canadian Mounted Police</i>	2013 CHRT 36

## SIGNIFICANT TRIBUNAL DECISIONS AND RULINGS

The following case summaries provide information about some Tribunal decisions or rulings that were particularly significant in their impact.

*MATSON ET AL. V. INDIAN AND NORTHERN AFFAIRS CANADA* 2013 CHRT 13 & *ROGER WILLIAM ANDREWS AND ROGER WILLIAM ANDREWS ON BEHALF OF MICHELLE DOMINIQUE ANDREWS V. INDIAN AND NORTHERN AFFAIRS CANADA* 2013 CHRT 21

Section 6 of the *Indian Act* defines the various persons who are entitled to be registered as "Indian". In *Matson*, the Complainants claimed that, due to their matrilineal Indian heritage, they are treated differently in their registration under subsection 6(2) of the *Indian Act*, when compared to those whose lineage is paternal and are registered under subsection 6(1). Namely, registration under subsection 6(2) does not allow the Complainants to pass on their status to their children. In *Andrews*, the issue was the previous enfranchisement provisions of the *Indian Act*. According to the Complainant, had his father not enfranchised, he would have been entitled to registration under section 6(1), as opposed to his current status under 6(2). With subsection 6(1) status, the Complainant would then be able to pass 6(2) status along to his daughter.

Both complaints were argued under section 5, as discriminatory practices in the provision of a "service". That is, Indian registration was argued to be a "service" within the meaning of section 5 of the *Canadian Human Rights Act*. The Tribunal disagreed. While the processing of registration applications by the INAC could be viewed as a service, the Tribunal found that the resulting status or lack thereof could not. INAC does not have any involvement in determining the criteria for entitlement to be registered, or not registered, as an Indian under section 6 of the *Indian Act*. Nor does it have any discretion in determining entitlement to be registered, or not registered, as an Indian pursuant to the criteria in section 6 of the *Indian Act*. Entitlement has been determined by Parliament, not the Respondent, through section 6 of the *Indian Act*; and, the Respondent must follow this section in processing applications for registration.

Therefore, the Tribunal was of the view that the complaints were challenges to section 6 of the *Indian Act* and nothing else. Pursuant to the Federal Court of Appeal's decision in *Public Service Alliance of Canada v. Canada Revenue Agency*, 2012 FCA 7 [*Murphy*], the Tribunal determined that complaints aimed at legislation per se, and nothing else, fall outside the scope of the *Canadian Human Rights Act*. An attempt to counter the application of legislation based solely on its alleged discriminatory impact could only succeed by way of constitutional challenge. Additional arguments, i.e. (1) that

*Murphy* was superseded by other Supreme Court of Canada authorities regarding the primacy of human rights legislation; (2) that provincial human rights bodies had accepted that human rights legislation could render legislation inoperable; and, (3) that current and former provisions of the *Canadian Human Rights Act* (including the former s. 67) indicated intent by Parliament to allow challenges to legislation under the Act, were also rejected by the Tribunal.

Both decisions are currently subject to applications for judicial review.

## RESULTS FOR CANADIANS

With the repeal of section 67 of the CHRA, the Tribunal now has the jurisdiction to consider discrimination complaints emanating from the application of the *Indian Act*. These two cases are an example of the complex and novel issues that have arisen as a result of the repeal of section 67 of the CHRA.

In these two decisions, the Tribunal provides insightful analysis and interpretation of the CHRA, examples of which include the Tribunal's determination that the complaint could be dismissed as a challenge to legislation; its interpretation of the term "service" as used in s. 5; and its determination regarding the primacy of human rights legislation.

## CHAUDHARY V. SMOOTHER MOVERS 2013 CHRT 15

The Complainant described himself as a brown skinned man of Middle Eastern descent. During the course of his employment with Smoother Movers, he claimed other employees made discriminatory comments relating to his race, national or ethnic origin and colour. He also claimed he was sexually harassed by one employee rubbing his buttock against him in a tightly packed elevator; and, in another incident, employees showing their buttock to him while they were bent over. After three days of working for Smoother Movers, the Complainant was not offered any more shifts and did not return to work for them.

The Tribunal found it was unclear why the Complainant did not return to work for Smoother Movers, but neither party contacted the other with regard to further work or lack thereof. Therefore, the Tribunal was of the view that the Complainant failed to establish a link between his discontinued employment and a prohibited ground of discrimination, pursuant to section 7(a) of the CHRA. On the sexual harassment claim, the Tribunal found the incidents did not persist beyond isolated occurrences, were not very severe, and the Complainant presented no evidence that the alleged acts were sexual in nature. Therefore, the Tribunal dismissed the Complainant's allegations of sexual harassment, pursuant to section 14 of the CHRA.

However, the Tribunal did find that there was some evidence to support the Complainant's allegations that he suffered adverse differentiation in employment, pursuant to section 7(b) of the *CHRA*, on the basis of the comments directed towards him from other employees. This evidence required an examination of the explanation put forward by the respondent: the owner of Smoother Movers and some of the employees involved categorically denied making the comments alleged or hearing anyone else making comments. In weighing the credibility of both sides of the story, the Tribunal preferred Smoother Movers' account: the Complainant never raised his allegations with his employer; there were inconsistencies in some of the Complainant's statements; and, the Complainant continued to interact with his co-workers during breaks and lunches, despite claiming to be hurt and offended by their comments. In weighing the totality of the evidence, the Tribunal found that the conduct alleged by the Complainant did not occur as he claimed.

As a result, the complaint was dismissed.

#### RESULTS FOR CANADIANS

The significance of this decision lies primarily in its provision of a clear and concise overview of the state of the law regarding the *prima facie* tests for discrimination under ss. 7(a), 7(b) and 14 of the *CHRA*. Specifically, the need to establish a link between a prohibited ground and the discriminatory conduct alleged; and, in terms of sexual harassment, the need to establish persistence, repetition and/or severity of the conduct and establishing that it is sexual in nature. This decision serves as a valuable reminder to complainants that they have an initial onus to lead some evidence in support of each constituent element of an alleged discriminatory practice.

#### *PALM V. INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 500, 2013 CHRT 19* *RICHARD WILKINSON AND CLIFF WILLICOME*

This was a ruling on a motion by the Complainant to amend her complaint. The Complainant's original complaint claimed she was discriminated and harassed on the basis of her sex, pursuant to sections 9, 10 and 14 of the *CHRA*. An amendment was requested because she alleged the Respondents retaliated against her for having filed the complaint against them, contrary to section 14.1 of the *CHRA*.

The Tribunal examined its jurisprudence on the subject of amendments and determined that it has the authority to amend complaints for the purpose of determining the real questions in controversy between the parties. However, it also noted that an amendment cannot introduce a substantially new complaint, as this would bypass the referral process mandated by the *CHRA*. Accordingly, the proposed amendment must be linked, at least by the complainant, to the allegations giving rise to the original complaint.

In applying these principles to the Complainant's request for an amendment, the Tribunal found that the Complainant provided a factual outline of the events giving rise to her allegations of retaliation; brought forward documentation to support those allegations; the events giving rise to her allegations of retaliation all occurred following the filing of her complaint; and, she believed the alleged retaliatory conduct to be linked to the filing of that complaint. The Tribunal also noted that the Respondents did not raise any issues of prejudice with regard to amending the complaint. On this basis, the Tribunal concluded that the Complainant presented a tenable claim of retaliation.

As a result, the Complainant's motion to amend her complaint was granted.

#### RESULTS FOR CANADIANS

While the Tribunal deals with amendment requests fairly regularly, the significance of this particular ruling is underscored by the fact that the Tribunal dealt with seven other similar requests within the past year. These types of issues highlight the importance of the Tribunal's pre-hearing case management efforts. In order to fulfill the Tribunal's legislative mandate of having expeditious proceedings, it is crucial that issues involving the scope of the hearing be dealt with prior to its commencement. This saves the parties and the Tribunal from expending time and money unnecessarily on this issue when the hearing commences. Also, allowing for amendments in appropriate cases saves the human rights system resources by avoiding the filing of an additional complaint, possibly having another investigation and, potentially, having a separate hearing.

#### *HICKS V. HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA 2013 CHRT 20*

As part of his employment, the Complainant was required to relocate from Sydney, Nova Scotia to Ottawa, Ontario. The Complainant's wife did not relocate to Ottawa with the Complainant in order to care for her elderly and disabled mother. As a result, the Complainant and his wife maintained dual residences. In this regard, the Complainant made an expense claim for temporary dual residence assistance under the Respondent's applicable Relocation Directive. That claim was denied because the Complainant's mother-in-law did not meet the definition of "dependant" in the applicable directive, as she was not living with the Complainant and his wife, but rather in an assisted-living apartment. In its interpretation and application of the Relocation Directive, the Complainant alleged the Respondent engaged in a discriminatory practice within the meaning of section 7(b) of the *CHRA* on the basis of family status.

The Tribunal found eldercare duties fell within the protection against discrimination on the basis of family status under the *CHRA*. The characteristics of the Complainant's family were defined by his and his wife's eldercare responsibilities towards their mother/mother-in-law. The purpose of the Relocation Directive was to assist transferred employees with relocating their lives, in the most efficient manner, while recognizing that efficiency must be balanced against any detrimental effects to the transferred employee or his/her family. Also, the Relocation Directive applied to all eligible persons irrespective of, among other things, family status. Despite the broad purpose and application of the Relocation Directive, the Complainant was denied assistance because of the characteristics of his family: that he and his wife cared for his elderly mother-in-law who, because of a permanent disability, could not live with them in the family home.

In response, the Respondent argued there was a rational basis for limiting financial assistance to family members living with the employee: employees do not need to maintain a second residence to facilitate their relocation unless they have dependant family members residing with them in these residences who are unable to relocate at the same time as the employee. According to the Respondent, assistance was not given for the voluntary separation of the family for personal reasons.

The Tribunal rejected this argument because no explanation was advanced by the Respondent, pursuant to section 15(2) of the *CHRA*, as to how an interpretation of the Relocation Directive that included the circumstances of the Complainant's family in relation to his need to maintain dual residences would have caused the Respondent undue hardship. Moreover, the Tribunal found that the Respondent's assumption justifying its policy in this case, that a second residence is not necessary if the dependent family member does not live there, clearly did not take into account family circumstances such as the Complainant's. Furthermore, the Respondent's assertion that the Complainant's family circumstances arose because of a "voluntary separation of the family for personal reasons" ignored the duties and obligations within the Complainant's family. The Tribunal also found that the Respondent's position contradicted the purpose of the Relocation Directive of minimizing the detrimental effects of relocation on a transferred employee and his or her family.

This decision is currently subject to an application for judicial review.

## RESULTS FOR CANADIANS

The relevance and importance of this decision lies in the Tribunal's interpretation of the prohibited ground of "family status". This decision marked the Tribunal's first opportunity to consider the Federal Court's decision in Canada (Attorney General) v. Johnstone, 2013 FC 113, wherein the Federal Court affirmed the Tribunal's previous finding that duties and obligations within the family are protected by the ground of family status. Applying the reasoning of that decision, and relying on the Ontario Human Rights Tribunal decision in Devaney v. ZRV Holdings Limited, 2012 HRTO 1590, the Tribunal in Hicks recognized for the first time that eldercare duties fall within the protection against family status discrimination under the *CHRA*. As the term "family status" is not defined in the *CHRA*, the Hicks decision has made a tangible contribution to the jurisprudential understanding of what is protected under this prohibited ground of discrimination.

### RULINGS ON MOTIONS AND OBJECTIONS

In addition to decisions, the full text of all formal rulings on motions and objections rendered in 2013 can be found on the Tribunal's website at

[http://decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/2013/nav\\_date.do](http://decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/2013/nav_date.do)





## TRIBUNAL ACTIVITIES

### APPOINTMENTS

In June 2013, the Government of Canada appointed three new part-time members to the Tribunal and reappointed one full-time member as well as the Vice-Chairperson. This brings to 12 the total complement of Tribunal members to inquire into complaints referred by the Canadian Human Rights Commission which will help reduce the accumulated backlog of cases.

### APPEARANCES BEFORE HOUSE OF COMMONS STANDING COMMITTEES

The Tribunal was invited to appear before the Senate Standing Committee on Human Rights in June 2013 as they pursued their examination of Bill C-279 which would add gender identity and gender expression to the list of prohibited grounds of discrimination in the *Canadian Human Rights Act*. The Acting Chairperson provided the Committee with an overview of the Tribunal's mandate and shared the extent to which the Tribunal has dealt with issues of gender identity or gender expression in the past.

### INTERNATIONAL COOPERATION

In September, the Tribunal hosted a meeting with a delegation of prominent experts and scholars from Taiwan to share best practices and lessons-learned on the resolution of human rights complaints from the perspective of the CHRT's jurisdiction.

This initiative organized by the Canadian Trade Office in Taipei (CTOT), Canada's representative office in Taiwan, aimed to provide this research group with tangible and practical information as they pursue the creation of a national human rights institution (NHRI) in Taiwan. The delegation was provided with an overview of the CHRT's mandate, jurisdiction, and its operations.

### MEMBERS MEETING

In November, the A/Chairperson convened a two day meeting in Ottawa for the full-time and part-time Members. Together with the legal services team, they discussed notable legal developments and case law updates. Complaint resolution models including principles, theories and practices of mediation were a predominant theme as the Tribunal continues to enjoy increasing success rate for complaint resolution using this mechanism. This meeting also provided Members, who are geographically dispersed from one another, the opportunity to exchange experiences and share information.

### CORPORATE MANAGEMENT ACTIVITIES

As with previous years, the unpredictability of the caseload going to mediation or hearings was also a planning challenge for the Tribunal in 2013. To strengthen the financial planning of the case variable expenditures such as travel, booking of facilities and part-time members per diems a new planning tool was developed along with standard operating procedures for planning purpose which enabled the Tribunal to improve the planning assumptions for these expenditures throughout the life cycle of each active case. In addition, travel and facilities rental procedures and processes were reviewed and reengineered to ensure better service levels.

Like small departments and other micro-agencies, the Tribunal continued to face pressure to respond to and implement various government-wide management initiatives with its limited resource levels. In 2013, the Tribunal partnered with another Tribunal for the delivery of its transactional financial services when its own financial officer retired thereby maximizing available resources. The Tribunal also continued to monitor the development of shared enterprise systems for financial management, human resources, case management and information management and continued with its commitment of continuously seeking effective and efficient internal services alternatives in line with the government's evolving direction towards shared service delivery.

# MEMBERS OF THE TRIBUNAL

## BIOGRAPHIES

### FULL-TIME MEMBERS

#### SUSHEEL GUPTA

##### ACTING CHAIRPERSON (VICE-CHAIRPERSON)

Appointed as Vice-chairperson in August 2010, Susheel Gupta was re-appointed in June 2013 for a five year term. He has also been serving as Acting Chairperson since April 2012. He obtained his Bachelor of Arts at the University of Waterloo in 1993 and his J.D. from the University of Ottawa in 1998. Called to the Ontario Bar in February 2000, he has been serving most of his career in the federal public service, as a prosecutor and computer crime advisor, as a special advisor at the Canadian Air Transport Security Authority, and as counsel in the Crimes Against Humanity and War Crimes section of the Department of Justice. Mr. Gupta is currently on leave from the Public Prosecution Service of Canada.

As a community member and public servant, Mr. Gupta has been the recipient of the Government of Canada Youth Award for Excellence, the Deputy Minister of Justice Humanitarian Award and, the Ontario Justice Education Network Chief Justice Lennox Award and the Queen's Diamond Jubilee Medal.

#### SOPHIE MARCHILDON

##### FULL-TIME MEMBER

Sophie Marchildon was appointed in 2010 as a full-time Member of the Canadian Human Rights Tribunal and was reappointed in June 2013 for another three-year term. She completed her Bachelor of Laws at the Université du Québec à Montréal. She completed her Master's Degree in International Law and International Politics at the Université du Québec à Montréal and was the recipient of the 2006 Award of Excellence for Best Student in the International Human Rights Law Clinic. She is currently pursuing an Executive Conflict Management Certificate from the University of Windsor Law School. She is a member of the Quebec Bar.

Ms. Marchildon has practiced civil litigation, immigration law, human rights law and health law in private practice and within various organizations. She served as a lawyer and co-director at the Council for the Protection of the Sick (Conseil pour la protection des malades) from 2005 to 2006, and was an assessor and member of the Quebec Human Rights Tribunal. She volunteered on several clinical ethics committees between 2005 and 2010, and worked as an ombudsman for health care services in the province of Quebec from 2006 until her appointment to the Canadian Human Rights Tribunal in May 2010.

With a licence in mediation from the Quebec Bar, Ms. Marchildon has handled more than 200 mediations in the realm of human rights and the health care system. She was part of the Quebec Ministry of Health and Social Services' Team of Visitors, which evaluated the quality of services and users rights in nursing homes across the province of Quebec.

### PART-TIME MEMBERS

#### MATTHEW D. GARFIELD (ONTARIO)

Matthew D. Garfield was appointed as a part-time Member of the Canadian Human Rights Tribunal in 2006 and re-appointed in 2011.

Mr. Garfield is a lawyer, chartered mediator and chartered arbitrator. He is the president of ADR Synergy Inc., a firm that specializes in mediations, arbitrations, workplace investigations and assessments, and the monitoring of implementation of Court/Tribunal orders. Mr. Garfield is also an adjudicator at the Indian Residential Schools Adjudication Secretariat.

From 2000 to 2004, Mr. Garfield was the Chair of the Human Rights Tribunal of Ontario. He had joined the Ontario Tribunal as Vice-Chair in 1998. He both adjudicated and mediated cases under the *Ontario Human Rights Code* involving claims of discrimination, harassment and reprisal. Prior to his appointment to the Ontario Tribunal, Mr. Garfield practised law in Toronto.



Mr. Garfield graduated from Dalhousie Law School in 1988 and was a recipient of the class prize in Constitutional Law. He was called to the Nova Scotia Bar in 1989 and the Ontario Bar in 1992.

#### *WALLACE G. CRAIG (BRITISH COLUMBIA)*

Wallace Gilby Craig was re-appointed in 2011 to a three-year term as a part-time Member of the Canadian Human Rights Tribunal. A former judge, he worked in the justice system for 46 years, including 20 years in a general practice.

Judge Craig was promoted to the Bench in 1975 and presided over the Vancouver Criminal Division—Provincial Court of British Columbia from 1975 until 2001. After retirement in his hometown of Vancouver, Judge Craig became the author of *Short Pants to Striped Trousers: The Life and Times of a Judge in Skid Road Vancouver*. He had earned his LL.B. from the Faculty of Law at the University of British Columbia.

#### *RÉJEAN BÉLANGER (QUEBEC)*

Réjean Bélanger was re-appointed in 2011 to a three-year term as a part-time Member of the Canadian Human Rights Tribunal. Mr. Bélanger is a lawyer and certified mediator.

He holds a Bachelor of Education from the Université de Montréal, as well as a Bachelor of Arts, a Bachelor of Commerce, a Master of Education and a Bachelor of Law from the University of Ottawa. Mr. Bélanger was admitted to the Quebec Bar in 1980 and has conducted a private practice in Gatineau, Quebec, principally in the areas of labour and administrative law.

He received his accreditation as a mediator in the areas of civil, commercial and family matters in 1997. He has argued before several administrative tribunals, the Superior Court of Quebec, the Court of Appeal and the Supreme Court of Canada.

Before becoming a lawyer, Mr. Bélanger served as deputy secretary of the Franco-Ontarian Teachers Association and as director of the Regional Office of the Teachers Association of West Quebec. He is also an active member of the board of directors of three non-profit organizations involved in bringing aid to African countries, the Antilles (Haiti) and Central America (Honduras).

#### *EDWARD LUSTIG (ONTARIO)*

Edward Lustig was re-appointed in 2011 to a five-year term as a part-time Member of the Canadian Human Rights Tribunal.

Mr. Lustig received his Bachelor of Arts from the University of Toronto, his Bachelor of Laws from Queen's University, and was called to the Bar of Ontario with First Class Honours in 1975. He has been a member of the Law Society of Upper Canada and the Canadian Bar Association since 1975. Mr. Lustig joined the legal department of the City of Niagara Falls in 1975 and, after 27 years of dedicated service, he retired in 2002. In January 2006 he joined Broderick & Partners as counsel and carries on a general law practice with particular emphasis on municipal law, planning and development matters, commercial and real estate law, and related litigation. Mr. Lustig also has experience in labour matters, including employment and pay equity.

#### *ROBERT MALO (QUEBEC)*

Robert Malo was appointed in May 2012 to a three-year term as a part-time Member of the Canadian Human Rights Tribunal. Called to the bar in 1978, Mr. Malo enjoyed a wide-ranging legal practice, encompassing civil litigation, marriage law, youth law, administrative law, and criminal and penal law. During the 1980s, Mr. Malo served as Vice-President of sales and administration and later as President and CEO of his family's commercial printing business in Joliette, Quebec.

In 1989, Mr. Malo returned to private practice until November 2003, when he became a permanent member of the Veterans Review and Appeal Board until January 2009. Between March 2010 and January 2011, Mr. Malo worked for a Laval, Quebec, law firm, where he served as head of business development in the Lanaudière region of Quebec. In December 2011, Mr. Malo became a partner at the law firm *Les avocats Alain Gagné et Robert Malo* in Joliette.

Mr. Malo has vast experience as a litigator, having appeared before the Quebec Court, Superior Court and Court of Appeal, and before the Supreme Court of Canada, as well as various quasi-judicial administrative tribunals. In addition to his qualifications as a lawyer and, more recently, as a permanent member of the Veterans Review and Appeal Board, Mr. Malo has also been a family mediator since 1997 and mediator in civil, commercial and labour matters since 2009. Mr. Malo is well known in his community for his involvement in numerous local organizations.

#### GEORGE E. ULYATT (MANITOBA)

George Ulyatt was appointed in December 2012 to a three-year term as a part-time member of the Canadian Human Rights Tribunal. He holds a Bachelor of Arts degree from Brandon University and a Bachelor of Laws degree from the University of Manitoba. Mr. Ulyatt was called to the Manitoba Bar in 1976 and has been in private practice for more than 35 years, litigating major cases in the Courts of Manitoba.

Mr. Ulyatt has worked with several administrative tribunals, serving as counsel to the Mental Health Review Board of Manitoba and the College of Registered Psychiatric Nurses of Manitoba, among others. He has previously been appointed an Inquiry Officer under the *Expropriation Act* and has conducted public inquiries throughout Manitoba.

As a community member and a volunteer, Mr. Ulyatt has been active in amateur sport at the team, provincial and national levels, serving a five-year term as President of Hockey Manitoba and as a member of the Board of Directors of Hockey Canada. In 2006 he received Hockey Canada's Order of Merit for contributions to hockey in Canada.

#### OLGA LUFTIG (ONTARIO)

Olga Luftig was appointed in December 2012 to a three-year term as a part-time member of the Canadian Human Rights Tribunal. She holds an Honours Bachelor of Arts degree in history and political science, as well as a Bachelor of Education from the University of Toronto. She received her Bachelor of Laws degree from the University of Windsor.

A practising lawyer, Ms. Luftig also serves as a part-time member of both the Town of Markham Municipal Election Audit Compliance Committee and the York Region Catholic and York Region District School Boards' Joint Election Compliance Audit Committee.

Ms. Luftig has had wide-ranging experience in diverse areas of the law, as both a former corporate in-house properties lawyer and as a private practitioner.

She also served as a member of the Landlord and Tenant Board of Ontario, where she adjudicated hearings.

#### DAVID THOMAS (BRITISH COLUMBIA)

David Thomas was appointed in June 2013 to a three-year term as a part-time member of the Canadian Human Rights Tribunal. He attended the University of British Columbia and the American College of Switzerland where he received his Bachelor of Arts, cum laude, in International Political Studies in 1985. He then graduated from Osgoode Hall Law School in Toronto, serving as the President of the Legal and Literary Society in his final year, before being called to the Bar of British Columbia in 1989. He started his career with one of Canada's oldest and largest law firms in Vancouver, becoming a partner in 1994, and thereafter leaving to work on behalf of a diverse group of clients in his own private law practice.

Acting for a variety of individuals and companies, both in Canada and abroad, Mr. Thomas is known for his expertise in the area of Business Immigration, combining his experience in business law and immigration practice. Mr. Thomas is a regular guest speaker for the Canadian Bar Association, the BC Society for Continuing Legal Education and other professional organizations. His work has required extensive international travel and as such, Mr. Thomas is well experienced with numerous cultures, traditions and customs around the world.

Mr. Thomas has served several non-profit organizations, including as President of the Canada-Korea Business Association, Chair of the West Vancouver Parks & Recreation Commission, Province President of Phi Delta Phi International Legal Honors Society, Director of the West Vancouver Chamber of Commerce, Trustee and Warden of St. Francis-in-the-Wood Anglican Church, Boy Scouts Leader, mentor in the Big Brothers organization and high school basketball coach. Mr. Thomas founded and serves as President of a charity that donates Canadian multi-vitamins to orphans in North Korea.

#### RICKI T. JOHNSTON (ALBERTA)

Ricki Johnston was appointed in June 2013 to a three-year term as a part-time member of the Canadian Human Rights Tribunal. She obtained her Bachelor of Education with Distinction from the University of Alberta in 1996 and her Bachelor of Laws with Distinction, also from the University of Alberta, in 1999. She has continued as a member of the Alberta Bar since being called in 2000.

Ms. Johnston practiced general civil litigation including in oil and gas, employment, insolvency and securities matters in the Province of Alberta until 2010. She has appeared before various courts, administrative and professional regulatory bodies and commissions. Since 2011, she has worked as a consultant with a private charitable foundation, with a focus on early childhood development, addiction and mental health.

*RONALD S. WILLIAMS (ONTARIO)*

Ronald Williams was appointed in June 2013 to a three-year term as a part-time member of the Canadian Human Rights Tribunal. He received his Bachelor of Arts degree at McMaster University in 1969 and obtained his LL.B degree from York University (Osgoode Hall), Toronto, in 1972. He was called to the Ontario Bar in 1974 and has been a member of the Law Society of Upper Canada in good standing since then.

Mr. Williams is a general practitioner in a private practice and has experience as corporate counsel. Mr. Williams's career has included representations before administrative tribunals, as well as serving as legal counsel to various groups, such

as veteran associations, religious, and ethnic organizations. Professional affiliations include the Canadian Bar Association, Lincoln Law Association, Hamilton Law Association, and Canadian Association of Corporate Counsel.

As a community member and volunteer, Mr. Williams has been involved as a Board Member and/or Officer of numerous community organizations that address the health care needs of children, adult and children rehabilitation, social and financial assistance of those in need, as well as charity fund raising.

## FOR FURTHER INFORMATION

**Executive Director & Registrar**  
**Canadian Human Rights Tribunal**  
160 Elgin Street, 11th Floor  
Ottawa, Ontario  
K1A 1J4

Tel: 613-995-1707  
Fax: 613-995-3484  
TTY: 613-947-1070  
E-mail: [registrar@chrt-tcdp.gc.ca](mailto:registrar@chrt-tcdp.gc.ca)  
Website: [chrt-tcdp.gc.ca](http://chrt-tcdp.gc.ca)

